Supreme Court, U.S.
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No. 99-1523

In The

Supreme Court of the United States

U.S. *ex rel.* A-1 AMBULANCE SERVICE, INC.,

Petitioner,

v.

THE COUNTY OF LOS ANGELES, CALIFORNIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the lack of identity of issues litigated in a prior False Claims Action filed by Petitioner defeat the application of the doctrine of collateral estoppel?

Petitioner did not present this argument in the courts below. The District Court granted summary judgment based on the identical legal issue which had been litigated by Petitioner in the prior action, i.e., whether publication and discussion of the details of disputed county contracts in public proceedings constituted "public disclosure" within the meaning of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

2. Is possession of information by the United States Government a condition precedent for the application of 31 U.S.C. § 3730(e), the "public disclosure" bar of the Federal False Claims Act?

Petitioner argued the second Question Presented in the District Court, but abandoned it in the Ninth Circuit Court of Appeals.

3. May Defendant(s) raise the public disclosure bar after the Attorney General has investigated the qui tam plaintiff's case, declined to intervene and filed no other motion on behalf of the United States?

Petitioner never raised the third Question Presented in the courts below and neither the District Court nor the Ninth Circuit addressed it.

PARTIES TO THE PROCEEDINGS

The parties are as indicated in the Petition.

STATEMENT PURSUANT TO RULE 29.6

In compliance with Supreme Court Rule 29.6, Respondents make the following disclosures.

Respondents Adams Ambulance Service, Inc.; Wilson Ambulance Service, Inc. and Crippen Ambulance Service, Inc. have been merged into Goodhew Ambulance Service, Inc. and the corporate name has been changed to American Medical Response of Southern California, which is a wholly owned subsidiary of American Medical Response, Inc., a Delaware corporation, which is a wholly owned subsidiary of Laidlaw Transit, Inc., a Delaware corporation, which is a wholly owned, indirect subsidiary of Laidlaw Inc., a Canadian corporation, which is publicly traded.

Respondent County of Los Angeles is a political subdivision of the State of California.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

This case is a companion to *United States ex rel. A-1 Ambulance Service, Inc. v. County of Monterey, et al.*, No. 99-1453. The actions were filed separately, in different districts, but the judgment of dismissal in this case was based, in part, upon the order of dismissal entered in the Monterey action. The cases were consolidated for argument in the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit then issued separate opinions, both dated February 7, 2000.

Both of these actions involve the same statutory provision, Section 3730(e)(4)(A) of the False Claims Act, which provides that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

Petitioner, A-1 Ambulance, has petitioned for Writs of Certiorari in both cases. The second and third Questions Presented in this petition are identical to those raised by Petitioner in No. 99-1453. The Respondents in that action have filed a brief in opposition to the petition and their arguments are repeated here.

The Respondents in this action will also address the first Question Presented, which involves application of the doctrine of collateral estoppel and is unique to this case.

STATEMENT OF THE CASE

Petitioner seeks review of the February 7, 2000 unpublished Memorandum Decision of the Ninth Circuit, affirming an October 6, 1997 Order of the United States District Court for the Central District of California, which dismissed Petitioner's *qui tam* False Claims Act action. The procedural history of this case and the companion case, No. 99-1453, are important to an understanding of the first Question Presented.

Petitioner, A-1 Ambulance, had filed two separate actions, against different California counties and different private ambulance companies, in two different federal districts. The claims in the two actions were identical, however. A-1 asserted in both actions that various contracts which had been awarded by the respective counties to private ambulance companies violated various provisions of the federal Medicare program. A-1's theory of the case, in both actions, was that claims submitted for reimbursement pursuant to those contracts constituted "false claims" within the meaning of the Act.

The defendants in the first action, filed in the Northern District of California, moved to dismiss that action on the grounds that the court lacked subject matter jurisdiction over the claims, pursuant to 31 U.S.C. § 3730(e)(4)(A), asserting that there had been "public

disclosure" of the "allegations or transactions" of the alleged fraudulent scheme because the county contracts at issue had been the subject of public hearings and meetings and the documentation concerning the contracts was a matter of public record.

On August 6, 1997, the Northern District of California dismissed the action, finding that there had been "public disclosure" within the meaning of the Act.[1] That decision was ultimately affirmed by the Ninth Circuit, and is the subject of the Petition for Writ of Certiorari in No. 99-1453.

The second action had been filed in the United States District Court for the Central District of California, against the County of Los Angeles and several private ambulance companies, all of whom had been awarded contracts to provide ambulance service in various parts of the county over an extended period of years. The defendants in the Central District action also moved to dismiss that case on the grounds that the court lacked subject matter jurisdiction, pursuant to 31 U.S.C. § 3730(e)(4)(A), asserting that there had been "public disclosure" of the "allegations or transactions" of the alleged fraudulent scheme because all of the contracts had been granted following numerous public hearings and meetings and the documentation concerning the contracts were a matter of public record.

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[1] The Northern District also found that A-1 did not claim to be an "original source" of the information and could not be an original source because it lacked "direct and independent information."

In addition to this ground, however, the defendants also raised the argument that A-1 was collaterally estopped from relitigating the legal issues of whether such public meetings, hearings and records constituted "public disclosure" within the meaning of the Act and whether the federal government had to possess knowledge of the alleged fraud. The defendants asserted that A-1 had litigated those exact same issues in the Northern District case and lost. The only defense A-1 raised to this argument was that a formal judgment had not been entered in the Northern District action, merely an order dismissing the case.

On October 6, 1997, the Central District Court dismissed on two, independent grounds. First, it held that A-1 was collaterally estopped from relitigating the legal issue of whether the details of publicly bid county contracts, which were awarded following a series of public meetings and hearings, with the documentation a matter of public record, constituted "public disclosure" of the "allegations or transactions" of alleged fraud pursuant to 31 U.S.C. § 3730(e)(4)(A). (*See* Appendix B to Petition for Writ of Certiorari in this case, p. 4a.) The District Court rejected A-1's argument that a formal judgment of dismissal was required in the Northern District case, finding that the Northern District order was sufficiently "final" for purposes of collateral estoppel. (*Id.*)

In addition, however, the court also held, regardless of any estoppel, that it lacked subject matter jurisdiction over the action because the "allegations or transactions" of the alleged fraud had been publicly disclosed prior to the commencement of the action. The court rejected A-1's

claim that the federal government had to possess knowledge of the alleged fraud or that the "disclosures" had to occur in some federal venue. (*Id.*, pp. 4a-5a.)

Petitioner appealed to the Ninth Circuit. The discussion of collateral estoppel was only two pages of A-1's fifty page opening brief. Once again, the only issue raised in opposition to the claim of collateral estoppel was the argument that a final judgment had never been entered in the Northern District action. (Opening Brief of Plaintiff-Appellant A-1 Ambulance Service, Inc., pp. 49-50.)

On February 7, 2000 the Ninth Circuit issued a detailed opinion in the appeal from the Northern District dismissal, which is now the subject of the Petition in No. 99-1453. In a separate, unpublished Memorandum decision, the Ninth Circuit also affirmed the Central District dismissal on the grounds that A-1 was collaterally estopped by reason of the Northern District dismissal. (*See* Petitioner's Appendix, pp. 1a-2a.)

In its present Petition, A-1 devotes a great deal of discussion to the public bidding process that took place in Los Angeles County during the period these contracts were awarded. It now seeks to contest factual issues, rather than the legal basis for the application of collateral estoppel to its claims. But this Court is not the proper place to contest factual findings, which two lower courts have necessarily found sufficient for application of this doctrine.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE APPLICATION OF COLLATERAL ESTOPPEL TO PETITIONER'S CLAIMS DOES NOT PRESENT ANY SIGNIFICANT ISSUE WARRANTING REVIEW BY THIS COURT

A. Petitioner Did Not Present This Argument To The Courts Below.

In a confusing argument, A-1 contends that the legal issue of whether the claims asserted in the Northern District action were "based upon" the publicly disclosed hearings, meetings and documents at issue in that case is somehow different from the legal issue of whether the claims in the Central District action were "based upon" the publicly disclosed hearings, meetings and documents at issue in the second case.

The only argument A-1 ever presented to either court below in opposition to the claim of collateral estoppel was that a judgment had not been entered in the Northern District action. It never raised any argument that the issues litigated in the Northern District were different than the ones presented in the Central District. As a general rule, this Court does not consider issues unless they have been presented to the lower courts for decision. The failure to raise an issue in the court below, absent extraordinary circumstances, precludes its consideration on appeal. *Sisson v. Ruby*, 497 U.S. 358, 359 fn. 1, 111 L.Ed.2d 292, 297-98 fn. 1, 110 S.Ct. 2892 (1990); *Yee v. Escondido*, 503 U.S. 519, 532-33, 118 L.Ed.2d 153, 168-69, 112 S.Ct. 1522 (1992).

B. Petitioner's Argument Amounts To A Claim That It Was An "Original Source" In The Northern District Case, A Claim It Never Presented Below.

Petitioner's argument is hard to follow, but the argument seems to be that the claims asserted in the Northern District action were not "based upon" the public disclosures surrounding the Monterey County contract because A-1 was an actual bidder for the Monterey County contract, whereas it was not a bidder for any of the Los Angeles county contracts. (*See* Petition for Writ of Certiorari, p. 12.) However, the Northern District Court ruled that Petitioner was not an "original source" of the information at issue and A-1 never claimed to be an "original source" in that action.[2]

Moreover, Petitioner never explains how it came to discover the alleged fraud in the present action if that discovery was not "based upon" the public disclosures made by Los Angeles County. Indeed, the fact that Petitioner did not even take part in the bidding process for any of the Los Angeles contracts proves that its claims are

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[2] Even if this status as a bidder made any difference, A-1 was not a bidder for the San Mateo County contract at issue in the Northern District action. Thus, A-1's claims against San Mateo County must necessarily have been "based upon" the publicly available documents and proceedings surrounding that contract. A-1's position in the Los Angeles County case was identical to its position with regard to San Mateo County. The legal issue was therefore exactly the same with regard to A-1's claims against San Mateo County in one action and Los Angeles County in the second action.

"based upon" the publicly available documents and proceedings because A-1 had no other way of knowing about these transactions.

C. There Was A Separate And Independent Basis For The District Court's Dismissal.

In dismissing this action, the Central District of California cited two, independent reasons for its decision. It first ruled that collateral estoppel prevented A-1 from relitigating the issue of subject matter jurisdiction based on the "public disclosure" bar of 31 U.S.C. § 3730(e)(4)(A). (*See* Appendix B to Petition for Writ of Certiorari in this case, p. 4a.)

However, it also ruled, without any estoppel, that it lacked jurisdiction because the "allegations or transactions" of the alleged fraud had been "publicly disclosed" during the process for granting the Los Angeles County contracts. (*See* Petitioner's Appendix, pp. 1a-2a.)

The Ninth Circuit chose to affirm on the basis of collateral estoppel, but there was a separate and independent basis for the Central District dismissal. That basis is the subject of the other two Questions Presented by Petitioner, which are identical to the Questions Presented in No. 99-1453.

II. THE 1986 AMENDMENT TO THE FALSE CLAIMS ACT DOES NOT REQUIRE THE FEDERAL GOVERNMENT TO POSSESS INFORMATION CONCERNING A FRAUD, BUT BARS CLAIMS BASED ON "PUBLIC DISCLOSURE" OF THE "ALLEGATIONS OR TRANSACTIONS" GIVING RISE TO THE CLAIM

Petitioner's second argument for considering the Petition for Writ of Certiorari is that the 1986 amendment to the False Claims Act, specifically 31 U.S.C. § 3730(e)(4)(A), requires that the federal government actually possess information about an alleged fraud before the "public disclosure" bar of that section can be triggered.

Petitioner cites to no authority, other than its misreading of this Court's decision in *Hughes Aircraft Company v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871 (1997), for this proposition. This argument ignores the history of the *qui tam* provisions of the False Claims Act and is directly contrary to the statutory framework adopted in 1986. The Petition should be denied.

A. The 1986 Amendment Replaced A Scheme Under Which Government Knowledge Was A Bar To A *Qui Tam* Action.

The history of the *qui tam* provisions of the False Claims Act has been set forth in numerous Court of Appeals decisions, and was discussed, in part, by this Court in *Hughes*, *see* 520 U.S. at 945-46. The statute has been amended several times in response to judicial interpretation.

In 1943, this Court held, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379 (1943), that the Act as then written did not require a relator to bring any original information to his *qui tam* action, and the relator could rely entirely on allegations and information developed by the government itself.

In response, Congress passed a provision, 31 U.S.C. § 3730(b)(4) (1985 ed.) (repealed), which required a federal district court to "dismiss [a *qui tam*] action . . . based on evidence or information the government had when the action was brought." This provision was eventually construed to require dismissal of an action even where the relator was the one who brought the information to the government, because the government had that information at the time the action was commenced. *See, e.g., United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984).

As a result of the backlash to this construction, Congress undertook a major overhaul of the statute in 1986, adopting an entirely new statutory scheme. One of the new provisions was Section 3730(e)(4)(A). The section provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

No longer was the focus on whether or not the government possessed information concerning the alleged fraud. Rather, the focus was now on whether the "allegations or transactions" of fraud had been the subject of "public disclosure" prior to the commencement of the *qui tam* action. If they had been, the district court would only have subject matter jurisdiction of the action if the relator was "an original source of the information." *See* 31 U.S.C. § 3730(e)(4)(A).

B. This Court's Ruling In *Hughes Aircraft* Did Not Hold That The Federal Government Must Possess Information Concerning A Fraud To Trigger The "Public Disclosure" Bar And There Is No Conflict Between *Hughes Aircraft* And The Ninth Circuit Decision In This Case.

Petitioner bases its entire argument on one paragraph of this Court's opinion in *Hughes Aircraft*, 520 U.S. at 946, 117 S.Ct. at 1876.

One of the undisputed facts in *Hughes Aircraft* was that the federal government was in possession of information concerning the alleged fraud before the action was commenced. Petitioner seems to think that this fact is enough to support its argument in the present case. However, the issue in *Hughes Aircraft* was not whether the government's possession of information was a necessary condition to application of the "public disclosure" provision of the 1986 Amendment to the FCA.

The issue in *Hughes Aircraft* was whether the 1986 amendment could be retroactively applied to allow a *qui tam* action based on alleged wrongs committed before the

amendment took effect. This court noted that, if the old law applied, the undisputed fact that the government already possessed the information would bar the *qui tam* action. On the other hand, if the 1986 law applied, the fact that the government already possessed the information would not bar the relator's *qui tam* action; rather, under the new law, the action would be barred only if (a) the action was based on information that had already been publicly disclosed in an appropriate forum and (b) the relator bringing the action was not an original source for the information. Two paragraphs of this Court's opinion summarize the holding in *Hughes Aircraft,* but Petitioner cites only the second one:

> The allegedly false claims at issue in this case were submitted by Hughes between 1982 and 1984. At that time, the FCA required a district court to "dismiss [a *qui tam*] action . . . based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982 ed.). The Ninth Circuit accepted, and respondent does not dispute, that because "the government was aware of [respondent's] allegations before he filed his suit, the [1982 provision] would bar his claim," were it applicable. 63 F.3d, at 1517.
>
> **Congress amended the FCA in 1986, however, to permit qui tam suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information. See 31 U.S.C. § 3730(e)(4)(A).** Because the 1986 amendment became effective before this suit was commenced, respondent contends that it,

> rather than the 1982 qui tam provision, controls. **We disagree.**
>
> 520 U.S. at 945-46, 117 S.Ct. at 1875-76.

In *Hughes Aircraft*, the fact that the government already possessed the information was an important fact, but it was important not because of any issues under the 1986 law – the law that is still in effect today – but rather, because under the *old* law, it would bar the relator's *qui tam* action. By quoting only the text in bold above, from the second paragraph of the two paragraphs above, Petitioner makes it look as though the government's possession of information is a significant element under the 1986 law, when in fact, it is not. Given the fact that there was no dispute that the government possessed information concerning the fraud before the action was commenced, the second paragraph merely states that this was no longer a disqualifying fact under the 1986 amendment, if it applied.

Further, in *Hughes Aircraft*, the court was not asked to consider a situation in which the government allegedly did not already possess the information about the alleged fraud at the time the action was commenced. Thus, *Hughes Aircraft* cannot be read as making any distinctions under the 1986 law between cases where the government already has the information when the *qui tam* action is first filed and cases where it does not. It stands only for the proposition that, under the old law, government possession of the information bars the *qui tam* suit, whereas under the 1986 law, government possession of the information does not bar the *qui tam* suit.

In fact, the Court had no occasion to construe the new "public disclosure" provision, other than to hold that it removed a defense which had existed under the prior statute, namely, possession of the information by the government prior to suit, 520 U.S. at 948, 117 S.Ct. at 1877. The Court did not hold that government possession of information concerning the fraud was a requirement for the new "public disclosure" bar to apply.

C. No Authority Supports Petitioner's Construction Of The FCA.

Rather than presenting this Court with evidence of a split of authority in the lower courts concerning its position, Petitioner cites to no authority for its argument that the FCA requires the federal government to possess knowledge of the alleged fraud before the "public disclosure" bar applies.

In fact, several courts of appeal have interpreted the 1986 amendment as replacing the focus on federal government knowledge of alleged frauds with the defined public disclosure framework. *United States ex rel. Williams v. NEC Corporation*, 931 F.2d 1493, 1497-98 (11th Cir. 1991); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 813 (9th Cir. 1995); *United States ex rel. Doe v. John Doe Corporation*, 960 F.2d 318, 321-22 (2nd Cir. 1992); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 19 (1st Cir. 1990), *cert. denied*, 499 U.S. 921, 111 S.Ct. 1312 (1991).

Further, several post-1986 cases have interpreted the jurisdictional bar as coming into play when the public

disclosure occurs in the context of **state** court proceedings. In these cases, there was no evidence that the federal government had the information in its possession when the *qui tam* action was filed. *See United States v. Northrop Corp.*, 59 F.3d 953, 967 (9th Cir. 1995) ("By filing his wrongful termination suit in state court, Green 'publicly disclosed' the allegation of fraud . . . "); *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1340-41, 1350-51 (5th Cir. 1994), *cert. denied*, 513 U.S. 928, 130 L.Ed.2d 278, 115 S.Ct. 316 (1994); *United States ex rel. Stinson v. Prudential Insurance*, 944 F.2d 1149, 1147-60 (3rd Cir. 1991).

Finally, public disclosure in "the news media" bars a *qui tam* action under the statute. There is no requirement that the media learn of the fraud from the federal government. This is perhaps the best example that under the 1986 amendment, the focus is on the fact that the "allegations or transactions" giving rise to the claim have already been aired in some "public" forum, rather than on determining exactly when some element of the federal government first learned of them.

This Court should deny the Petition as to the second Question Presented because there is no support for Petitioner's construction of the statute, no conflict in the lower courts concerning Petitioner's construction and because Petitioner has argued, abandoned and then resurrected this argument as it has suited Petitioner's purposes in this protracted litigation.

III. PETITIONER'S ARGUMENT ON THE THIRD QUESTION PRESENTED WOULD DEPRIVE *QUI TAM* DEFENDANTS OF ANY OPPORTUNITY TO CHALLENGE THE SUBJECT MATTER JURISDICTION OF THE TRIAL COURT

A relator commences a *qui tam* action by filing a complaint, under seal, and serving the complaint and "written disclosure of substantially all material evidence and information the person possesses" upon the government, 31 U.S.C. § 3730(b)(2). The government then has at least 60 days to review the case, *in camera*, to decide whether to intervene, *id.*

The government has the option to proceed with the action, assuming primary responsibility for the conduct of the case, or to decline to take control of the action and allow the relator to proceed with the case, Section 3730(b)(4). During this period of time, the defendant has not yet been served with the action and is not served until the trial court orders service to be effectuated, Sections 3730(b)(2) and (b)(3).

The petitioner argues that only the government can raise the "public disclosure" bar provision of the FCA, Section 3730(e)(4)(A) and only during this *in camera* period. In petitioner's phrase "once the government declines to dismiss the case, public disclosure litigation is over." *See* Petition at p. 16, argument heading II.D. There are several problems with this argument.

A. Petitioner Did Not Present This Argument To The Courts Below.

Petitioner did not make this argument in the court's below. As a general rule, this Court does not consider issues unless they have been presented to the lower courts for decision. The failure to raise an issue in the court below, absent extraordinary circumstances, precludes its consideration on appeal. *See* Section I.A *supra*.

B. A-1's Construction Does Not Make Any Sense Given The Statutory Scheme At Issue.

A-1 asserts, in heading II.D (Petition for Writ, p. 16), that "once the government declines to dismiss the case, public disclosure litigation is over." This position does not make any sense in practice, in light of the statutory framework in which the public disclosure bar is found.

Under 31 U.S.C. § 3730(b), a private party (the "relator") may bring a *qui tam* action in the name of the government to seek redress for certain wrongs against the government. The complaint in such an action is initially sealed for a limited period of time, to enable the government to investigate the matter. Under Sections 3730(b)(4) and (c), the government then has the option of taking over the case, intervening in the case, settling the case, dismissing the case, or allowing the private party to proceed with the case without the government's participation.

Under Section 3730(c)(2)(A), the government may dismiss the case for any reason that it deems appropriate.

The government does not need to rely on any jurisdictional bar in order to dismiss the case. Indeed, under Section 3730(e)(4)(A), the public disclosure bar does not apply to actions brought by the Attorney General on behalf of the government. Moreover, the relator who brings the action is not going to assert the public disclosure bar, because that would result in the dismissal of his own action. Thus, the only party to such a *qui tam* action who would conceivably assert the public disclosure bar in order to get the case dismissed is the **defendant**. A-1's position is that the public disclosure bar is no longer available to the defendant, once the government decides not to dismiss the case. This makes no sense whatsoever, since it takes away from the defendant the ability to rely on this defense that has been given to the defendant by statute.

Furthermore, the government can decide to dismiss the case at any time – either early on during the case, or after the case has been pending for several years, or any time in between. Thus, as long as the case is pending, it must be true that the government has declined to dismiss the case. Thus, according to A-1, as long as the case is pending, the defendant cannot raise the public disclosure bar because the government has declined to dismiss the case. Again, A-1's position makes no sense whatsoever.

C. Petitioner's Construction Would Violate Long-Standing Federal Judicial Practice And Would Raise Constitutional Problems For This Provision.

1. A Party Can Always Challenge Subject Matter Jurisdiction

Petitioner fails to consider that the "public disclosure" bar of Section 3730(e)(4)(A) is a jurisdictional requirement for a *qui tam* action. The section begins "No court *shall have jurisdiction* over an action under this section based upon the public disclosure of allegations or transactions . . . " (*Id., emphasis added.*)

The subject matter jurisdiction of a court can always be challenged, at any time, either by the parties or by the court itself and cannot be conferred by consent of the parties, *City of Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54, 59, 48 S.Ct. 454, 456 (1928); *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934). Petitioner's argument would abrogate this long established federal judicial principle.

2. Petitioner's Argument Would Deprive Defendants of a Defense Without Due Process

This Court attempts to construe statutes to avoid constitutional infirmities, *Cheek v. United States*, 498 U.S. 192, 203, 111 S.Ct. 604, 611 (1991). As described above, nothing in Section 3730(e)(4)(A) or federal case law supports Petitioner's reading of this provision.

However, were Petitioner's construction to be applied, then defendants would never have a chance to argue that the court hearing their case lacked jurisdiction to do so. Under the statutory scheme, the defendant is unaware of the action while it is under seal and is not served with the complaint until the government decides whether to assume control of the case. Under Petitioner's reading of the provision, by the time the defendant is served with the complaint it is already too late to challenge jurisdiction unless the government has already done so.

This would create obvious due process difficulties with the statute. *See, e.g., American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102 (1932). ("Due process requires that there be an opportunity to present every available defense.")

IV. THIS PETITION COULD BE AFFECTED BY THE DECISION IN *VERMONT AGENCY OF NATURAL RESOURCES v. UNITED STATES EX REL. STEVENS*, NO. 98-1828

On November 19, 1999, the Court asked the parties in the *Vermont* case to brief the issue of whether a private person relator has Article III standing to pursue a *qui tam* action, at least where the government declines to take control of the case.

If this Court were to hold in *Vermont* that a private relator lacks Article III standing to pursue a *qui tam* action where the government declines to assume control

of the case, that would be a separate, and independent basis why review in this case would not be necessary.

CONCLUSION

A-1 Ambulance has been challenging the actions of various California counties regarding emergency medical care for many years. This particular challenge has reached all the way to this Court, but there are no significant federal issues presented which would justify review by this court.

Respectfully submitted,

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